

## Remarks

The various parts of the Office Action (and other matters, if any) are discussed below under appropriate headings.

### ***I. Declaration***

A Declaration under 37 C.F.R. §1.131 is being submitted with this response. The Declaration establishes a date of invention at least as early as June 17, 2003, which is prior to the filing date of *Nixon et al.* (U.S. Pat. Pub. 2004/0259533 - filing date of June 18, 2003). Accordingly, *Nixon et al.* does not qualify as prior art for the instant application.

Applicants note that a similar Declaration was filed previously in response to the final Office Action mailed on July 18, 2006 (since remailed as the present Office Action). The Examiner issued an Advisory Action indicating that the Declaration had not been entered because it raised new issues and because a reason was not given why the Declaration had not been previously submitted. For the reasons set forth below, applicants respectfully disagree with the Examiner's contention that the Declaration raised new issues, and also provide a reason why the Declaration was not previously submitted.

### ***II. Timeliness of Declaration***

Section 716.01 of the MPEP provides generally applicable criteria for evidence traversing rejections. Section 716.01(B) states that

Evidence traversing rejections, when timely presented, ***must be considered*** by the examiner whenever present.... ***Where an examiner holds that the evidence is sufficient to overcome a prima facie case, the comments should be consistent with the guidelines for statements of reasons for allowance*** (emphasis added).

In the present case, the Declaration removes *Nixon* as a reference. As discussed below, *Nixon* is the primary reference relied upon by the Examiner, and its removal as a reference renders all of the Examiner's rejections moot. Thus, if the Declaration is considered timely, then the Examiner's comments should be consistent with statements for reasons for allowance, and not that the Declaration "raises new issues".

Section 716.01(A) discusses timeliness of filing evidence, and provides that

**Affidavits and declarations submitted under 37 CFR 1.132 and *other evidence traversing rejections are considered timely if submitted:***

**(3) after final rejection \*\*>, but before or on the same date of filing an appeal, *upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e).***

The enclosed Declaration was not previously submitted because, in applicant's opinion, the claims of the present application were distinguishable from the art cited in the first Office Action dated December 22, 2005. In response to the Examiner's rejections as set forth in the first Office Action, applicant presented well-reasoned arguments on the merits distinguishing the claims of the present application from the cited art. Due to these well reasoned arguments based squarely on the merits, the Declaration was not believed to be necessary.

In response to applicant's arguments as set forth in the reply to the first Office Action, the Examiner maintained all rejections and made the Action final. While applicant disagrees with the Examiner's rejections, in the interest of advancing prosecution, applicants now are resubmitting the Declaration establishing a date of invention prior to the *Nixon* reference. This Declaration is necessary because the Examiner maintained all claim rejections despite applicant's arguments clearly distinguishing the claims from the cited art.

In view of the above, it is respectfully submitted that the Declaration is timely submitted and, therefore, must be considered. Further, in view of the fact that the Declaration removes *Nixon* as prior art, all rejections should be withdrawn as indicated below.

### **III. Claim Rejections - 35 USC § 103**

Claims 1-3, 7-10, 14-6, 18-20 and 23-31 stand rejected under 35 USC §103(a) as being unpatentable over *Nixon et al.* in view of *Findikli et al.* (U.S. Pat No. 6,529,727). Claims 4-6, 11-13 and 21-22 stand rejected under 35 USC §103(a) as being unpatentable over *Nixon et al.* in view of *Findikli et al.* in further view of *Rosenberg et al.* (U.S. Pat No. 6,628,934). Claim 17 stands rejected under 35 USC §103(a) as being unpatentable over *Nixon et al.* in view of *Findikli et al.* in further view of *Natsumo* (U.S. Pat. Pub. 2005/0148367). Withdrawal of the rejections is respectfully requested for at least the following reasons.

As noted above, *Nixon et al.*, which is the primary reference relied upon to reject the claims of the present application, does not qualify as prior art. Thus, the Examiner has not established a *prima facie* case of obviousness.

Accordingly, withdrawal of the rejection of claims 1-31 is respectfully requested.

#### IV. Conclusion

In view of the foregoing, request is made for timely issuance of a notice of allowance.

Respectfully submitted,

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